YAP PIEW CHUAN

v.

ARACA ENTERPRISE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: D2-22-62-1996]
15 DECEMBER 1997

CIVIL PROCEDURE: *Summary judgment - Appeal against summary judgment - Whether a defence of mere denial - Whether allegations supported by particulars - Whether there are issues that merit full trial - Rules of the High Court 1980, O. 14 - Whether court considers appeal as a fresh application (rehearing)*

CIVIL PROCEDURE: *Appeal - Appeal from registrar - Notice of appeal - Filing of - Time limit - Whether appellant filed notice within five days - Whether court issued notice before expiry of five days - Whether duty of counsel to ensure that notice is issued by court in time - Whether matter within control of counsel or court - Rules of the High Court 1980, O. 56 r. 1(3)*

CIVIL PROCEDURE: *Summary judgment - Application for - Affidavit in support - Requirements - Compliance with Rules of the High Court 1980, O. 14 r. 2(1) - Failure to include Form 18 para 2 in affidavit - Whether fatal to application for summary judgment - Whether there was material compliance*

CIVIL PROCEDURE: *Documents - Language of documents - National or English language - Appearance of Chinese characters - Whether constitutes procedural defect - Whether documents may be admitted as exhibits - Whether judge can understand nature of documents and transactions recorded therein - Relevance - Sykt Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd - Rules of the High Court 1980, O. 92 r. 1*

CIVIL PROCEDURE: *Affidavits - Time limit for filing and service of affidavit in reply - Rules of the High Court 1980, O. 32 r. 13(2)(b) - Whether applies to O. 14 summary judgment proceedings - Conflicting decisions of Court of Appeal - Perbadanan Nasional Insurans v. Pua Lai Ong - Structural Concrete Sdn Bhd v. Wing Tiek Holdings Bhd*

CIVIL PROCEDURE: *Appeal - Appeal from registrar's order giving summary judgment - Notice of appeal - Whether appellant must specifically state therein the particular decision being appealed against*

This was an appeal by the defendants against the decision of the Senior Assistant Registrar ('the SAR') given on 15 October 1996. The SAR gave three decisions, namely disqualifying the defendants' two affidavits as being out of time according to O. 32 r. 13(2)(b) of the Rules of the High Court 1980 ('the RHC'), allowing the plaintiff's application for summary judgment and refusing the defendants' application for stay of execution.

The notice of appeal was filed on 18 October 1996 but it was not certain when the SAR actually signed the notice and when it was issued. It could only be shown that the notice was posted out on 28 October 1996 and the hearing date fixed for 20 November 1996. The notice was served on the plaintiff on 25 March 1997.

In the notice of appeal, instead of citing O. 14 of the RHC as the rule under which the application for summary judgment was made, O. 26A of the SCR was cited. At the hearing on 20 November 1996, counsel for the defendants orally applied, in the absence of the plaintiff, for the notice to be amended so that O. 26A could be changed to O. 14, and this was allowed by the court. The plaintiff subsequently raised an objection to the notice of appeal on account of this amendment.

The plaintiff further urged the court to dismiss the appeal as the notice of appeal was a nullity for not having complied with O. 56 r. 1(3) of the RHC which required the notice to be issued within five days after the judgment of the SAR was given.

The defendants, however, argued that the plaintiff's application for summary judgment should be dismissed on account of the following procedural defects: (i) the affidavit in support of the application, in content and wording, was not in compliance with Form 18 in that the phrase "that the said debt was incurred and is still due and owing as aforesaid" had not been included in the plaintiff's affidavit in this case; and (ii) there was non-compliance with O. 92 r. 1 of the RHC in that certain documents were neither in the Malay language nor in the English language. This was because of the appearance of certain Chinese characters which were used to described the goods in the invoices which the plaintiff had tendered as exhibits in its claim against the defendants for goods sold and delivered.

Held:

[1] The defendants' error in citing O. 26A of the SCR instead of O. 14 of the RHC was immaterial and did not affect the validity of the notice of appeal even if it was not amended. The plaintiff would not have been misled as to what the defendants were appealing against. It was therefore not necessary to give the plaintiff an opportunity to be heard on the amendment.

[2] The issuance of the notice of appeal was a matter within the control of the court and beyond the control of the defendants. So long as the defendants filed the notice of appeal within the five days, it would not be fair to penalise them if the court should issue it after five days.

[3] The failure to include para 2 of Form 18 into the plaintiff's affidavit in support of his application for summary judgment was not fatal to the application. Considering the affidavit as a whole, it did amount to the plaintiff saying that the debt was incurred and was still due and owing. The plaintiff's affidavit, therefore, had materially complied with Form 18.

[4] The present case could be distinguished from *Sykt Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd*. In the present case, the invoices were documents in the English language but contained certain words in Chinese. Nevertheless, the court was able to understand the nature of the documents and the transactions that they recorded. What was not known was the description of the goods concerned, which was not in issue here. The invoices could be admitted as exhibits to substantiate the plaintiff's claim.

[5] In appealing against the order giving summary judgment, the defendants were entitled to take issue on any decision made by the SAR in the course of hearing and adjudicating the application, including a decision on the question of affidavits, without having to specifically state in the notice of appeal that they were also appealing against that particular decision, notwithstanding that the decision was expressed separately in the order that was extracted.

[6] On the question of stay, the question of whether the defendants were precluded from appealing on it was not crucial because it was open to the court to consider that question afresh and not as a point of appeal. Also, since an appeal from a decision of the SAR is by way of a rehearing of the matter in question, it is not important for the court to see whether and where the SAR has erred. The court considers the application afresh and decides it as if it is doing so at first instance.

[7] Order 32 r. 13(2)(b) of the RHC does **not** apply to affidavits in reply in O. 14 proceedings. Therefore, the defendants' affidavits in reply were not disqualified and should be considered by the court. Having considered the affidavits, the court was of the view that the defendants had merely raised bare allegations not supported by any particulars to satisfy the court that there were issues that meritted looking into in a full trial.

[Appeal against summary judgment dismissed; stay refused.]

Cases referred to:

Chern Yen Ming v. Teng Ik Ngee Construction Sdn Bhd [1996] 1 CLJ 571 ***(not foll)***
PB Securities Sdn Bhd v. Abdul Rashid Mohamed [1994] 3 CLJ 209 ***(foll)***
Pelasari Sdn Bhd v. Reebok Sdn Bhd (Civil Suit No: S3-22-303-(1994) ***(foll)***
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(not foll)***
Structural Concrete Sdn Bhd & 3 Ors v. Wing Tiek Holdings Bhd [1997] 1 CLJ 300 ***(foll)***
Sykt Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd [1994] 2 CLJ 729 ***(dist)***
Wing Tiek Holdings Bhd v. Yong Chee Thiam & Anor [1994] 3 MLJ 379 ***(not foll)***

Legislation referred to:

Rules of the High Court 1980, O. 14 rr. 2(1), 3(2), O. 32 r. 13(2)(b), O. 56 r. 1(3), O. 92 r. 1

For the plaintiff - Selvi Nachiappan; M/s Skrine & Co
For the defendants - Gurdip Singh; M/s Jagjit Singh & Co

Reported by Ling Hea Hoon & Gan Peng Chiang

JUDGMENT

Abdul Aziz Mohamad J:

This is an appeal by the defendants against the decision of the learned Senior Assistant Registrar ('SAR') given on 15 October 1996 allowing the plaintiff's application for summary judgment. The notice of appeal was filed on 18 October 1996. When filed, it bore the date 17 October as the date when it was signed by the defendants' solicitors and the date 17 October also as the date when the SAR would be signing it. The SAR could only have signed it on or after 18 October but he did not change the date 17 October. It is not certain when he actually signed the notice and when it was issued, but to go by a handwritten note appearing on the copy of the notice in the court file, the notice could have been posted out on 28 October bearing the date 20 November as the date of hearing of the appeal. It was served on the plaintiff only on 25 March 1997. It said in effect that the defendants intended to appeal against the decision of the SAR given on 15 October 1996 allowing

the plaintiff's application for judgment in the sum of RM672,408.32. Instead of citing O. 14 as the rule under which the application for summary judgment was made, it cited O. 26A, which is the rule in the Subordinate Courts Rules for summary judgment in the subordinate courts.

When the appeal came before me on 20 November 1996, the notice had not been served, so the plaintiff was not represented. Learned counsel for the defendants applied orally to have the notice amended so that O. 26A be changed to O. 14. It was to me an immaterial error that did not affect the validity of the notice even if it was not amended. The plaintiff would not have been misled as to what the defendants were appealing against. Since, however, an application to amend was made, albeit orally, I allowed it as a matter of course, and since I regarded that the error was immaterial, I did not consider it necessary to give the plaintiff an opportunity to be heard on the amendment.

The plaintiff has raised objection to the notice of appeal on account of the amendment. For the reasons that I have given, I dismiss that objection.

The plaintiff also urges that the appeal be dismissed as, according to him, the notice of appeal was a nullity for not having complied with O. 56 r. 1(3), which requires the notice to be issued within five days after the judgment, order or decision appealed against was given or made. As I said, it is likely in this case that the notice was issued after the five days. While the rule requires the notice to be issued within the five days, it must be appreciated that the issuance of the notice is a matter within the control of the court and beyond the control of the appellant. So long as the appellant has filed the notice of appeal within the five days, it would not be fair to penalise him if the court should issue it after the five days. I am, with respect, unable to agree with the suggestion to be inferred from *Chern Yen Ming v. Teng Ik Ngee Construction Sdn. Bhd.* [1996] 4 MLJ 227 that it is the duty of the appellant's solicitors to do their utmost after the notice of appeal has been filed to ensure that the court does issue the notice before the expiry of the five days. Putting such a suggestion into effect might result in an unseemly and stressful state of affairs between solicitors and court officials, rather than having which it is better to rule that an appellant should not have his appeal jeopardised by failure of the court to issue the notice of appeal before expiry of the five days.

The defendants argue that the plaintiff's application for summary judgment should be dismissed because there are allegedly three procedural defects with the application.

The first defect concerns the name of the plaintiff. I find that this complaint is so devoid of merit that I shall not dwell on it.

As for the second defect, it is said that the affidavit in support of the application, in its contents and wording, is not in compliance with Form 18 which is prescribed by O. 14 r. 2(1). In particular, it is said that the second paragraph of Form 18, in which a plaintiff should affirm "that the said debt was incurred and is still due and owing as aforesaid" has not been included in the plaintiffs' affidavit in this case. Although the plaintiff's written submission has dwelt at length on this alleged defect, I shall simply say that I do not consider that the failure to include para. 2 of Form 18 is fatal to the application. Considering the affidavit as a whole, I am satisfied that it does amount to the plaintiff saying that the debt was incurred and was still due and owing. In other respects, I find that the affidavit materially complies with Form 18.

The third defect is non-compliance with O. 92 r. 1, in that certain documents are neither in the Malay language nor in the English language. So that my views on this alleged defect may be fully appreciated, I shall set out certain salient facts about the plaintiff's claim.

The claim of the plaintiff in the statement of claim is for payment of the price of certain unnamed goods sold and delivered to the defendants at their request. Paragraph 3 of the statement of claim lists out seventeen invoices for the goods, with the date, invoice number, and amount of each. The amounts total RM692,408.32. With the deduction of three payments totalling RM20,000, the amount claimed by the plaintiff is RM672,408.32.

The affidavit in support of the application for summary judgment is virtually a repetition of the contents of the statement of claim, but with the addition of certain documentary exhibits, including the seventeen invoices.

The invoices are pre-printed forms in English with handwritten particulars of the transactions. It is clear that they are the invoices of the business of which the plaintiff claims he is the sole owner. Each of the invoices bears the acknowledgment of the defendants. The particulars tally with the particulars given in the statement of claim and in the body of the affidavit itself as regards dates and prices. The description of the goods is, however, in Chinese characters but does include, in most cases, the words "satin", "nylon tricot", or "polyter tricot brush". The quantities are in English, for example, so many pieces of so many yards or meters at such and such a price per yard or meter.

It is because of the appearance of the words in Chinese characters in the invoices, which are used to describe the goods, that the defendants contend that there was a procedural defect in the application for summary judgment.

They rely on the following passage from the judgment of the Supreme Court in *Sykt Telekom Malaysia Bhd. v. Business Chinese Directory Sdn. Bhd.* [1994] 2 MLJ 420 at p. 423:

> We find that O. 92 r. 1 of the RHC, is a mandatory provision which requires that any document which is not in the national language or in the English language must be translated into the national language before it can be admitted as an exhibit.

The defendants argue in effect that the invoices should not be admitted as exhibits and that without them there is no evidence to substantiate the claim of RM672,408.32.

The defendants filed a statement of defence and a counterclaim. Paragraph 3 denies the debt alleged in para. 3 of the statement of claim and puts the plaintiff to proof. In para. 6 of the statement of defence, the defendants aver that the goods sold by the plaintiff were damaged or not merchantable and contend that "harga wang adalah dikurangkan yang dimintai", which I take to mean that the defendants want the price to be reduced accordingly. The counterclaim is for a sum of RM727,774.67 being the amount allegedly due by the plaintiff to the defendants, including interest, on account of, goods allegedly bought by the plaintiff from the defendants.

In the *Sykt Telekom Malaysia* case, the document in question was a book called *Malaysia Business Chinese Directory* which was in Chinese writing. The question was whether it was a telephone directory. The Supreme Court said that it was impossible for the learned judge, by looking at the book, to come to any decision on the question because he himself was unable to understand what the book contained. It was a clear case of a document not being in Malay or English.

In the present case, I view the invoices as documents in the English language but containing certain words in Chinese. I am able to understand the nature of the documents and the transactions that they record. What I do not know is the description of the goods concerned. The description of the goods is, however, not in issue. There is no dispute as to the identity of the goods. The defendants themselves know well enough what the goods were to be able to allege that they were damaged and not merchantable. For those reasons I am of opinion that the invoices are not caught by the passage in the *Sykt Telekom Malaysia* case that I have cited. They may be admitted as exhibits and they can be seen to substantiate the plaintiff's claim.

At the hearing of the application for summary judgment, the learned SAR had before him four affidavits: the plaintiff's first affidavit, that is, the affidavit in support of the application; the defendants' first affidavit, which was in reply to the plaintiff's first affidavit; the plaintiff's second affidavit, which was in reply to the defendants' first affidavit; and the defendants' second affidavit, which was in reply to the plaintiff's second affidavit. Both the defendants' affidavits had been out of time according to para. (2)(b) of O. 32 r. 13.

According to the SAR's notes in the case file, at the hearing he heard the submission of learned counsel for the plaintiff, which dealt with the statement of claim, the affidavit in support of the application for summary judgment and the statement of defence. Learned counsel for the plaintiff submitted that, apart from the statement of defence, the defendants did not have any material by which to resist the application because their two affidavits were disqualified. After hearing the submission of learned counsel for the defendants and further submission of learned counsel for the plaintiff, the learned SAR found, after looking at the statement of defence, that the defendants did not have any defence to the plaintiff's claim and had not raised any triable issue as their affidavits had been disqualified. He therefore gave judgment against the defendants on the plaintiff's claim. He also refused an oral application by the defendants for stay of execution. The stay was sought under para. (2) of O. 14 r. 3, which provides as follows:

> (2) The court may by order, and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action.

In the present appeal, the defendants endeavour to argue for admission of their two affidavits and for stay of execution. The plaintiff seeks to bar the defendants from taking up those two issues because they have not stated in their notice of appeal that they are also appealing against the SAR's decision on those two issues. The order extracted on the judgment recorded the SAR as having made three decisions, namely, decisions disqualifying the defendants' affidavits, giving judgment on the plaintiff's claim, and refusing the application for stay.

As regards the disqualification of the affidavits, that was done in the process of dealing with the application for summary judgment which, at the end of the day, the SAR granted. In my view, in appealing against the order giving summary judgment, the defendants are entitled to take issue on any decision made by the SAR in the course of hearing and adjudicating on the application, including a decision on the question of affidavits, without having to specifically

state in the notice of appeal that they are also appealing against that particular decision, notwithstanding that the decision is expressed separately in the order that was extracted.

As regards the question of stay, the question of whether the defendants are or are not precluded from appealing on it is not crucial because I think it is open to me to consider that question afresh, that is, not as a point of appeal, should I dismiss this appeal against the summary judgment and affirm the order of the SAR.

The defendants argue that the SAR failed to consider the defendants' statement of defence and counterclaim and had therefore ordered summary judgment without considering whether the defendants had shown cause against the application for it. As I have said, the notes indicate there was submission on the statement of defence and the SAR did consider it before arriving at his decision. The notes make no specific mention of the counterclaim and it is not certain whether the SAR did consider the counterclaim, but if he did not, that could have been because, to go by the notes, counsel for the defendants did not in his submission raise the question of the counterclaim.

The importance to the defendants of questioning in this appeal the process by which the SAR arrived at his decision lies in the approach taken by them in this appeal that if they succeed on any of the points they have raised in the appeal, the court should order a rehearing of the application for summary judgment on its merits before another SAR. Since, however, an appeal from a decision of the SAR is by way of a rehearing of the matter in question, it is not important for the court to see whether and where the SAR has erred. The court considers the application afresh and decides it as if it were doing so at first instance. The present appeal is not one merely against a decision on a preliminary issue. It is against the decision on the heart of the application for summary judgment, arrived at after considering the merits of the application.

As regards the affidavits, there are two conflicting pronouncements by the Court of Appeal on the question. In *Perbadanan Nasional Insurance Sdn. Bhd. v. Pua Lai Ong* [1996] 3 CLJ 321, the Court of Appeal, after considering a number of High Court decisions, confirmed the decision in *Wing Tiek Holdings Bhd. v. Yong Chee Thiam & Anor.* [1994] 3 MLJ 379 that O. 32 r. 13(2)(b) applies to the affidavit in reply in a summary judgment application. In *Structural Concrete Sdn. Bhd. & 3 Ors. v. Wing Tiek Holdings Berhad* [1997] 1 AMR 589, the Court of Appeal adopted the observation of the learned judge in *PB Securities Sdn. Bhd. v. Abdul Rashid bin Mohamed* [1994] 2 AMR 33: 1694 to the effect that O. 32 r. 13(2) does not apply to the procedure for

summary judgment. In view of the conflicting decisions, I shall adhere to my decision in *Pelasari Sdn. Bhd. v. Reebok Sdn. Bhd. & Anor*. in Guaman Sivil No. S3-22-303-1994 (unreported), which I delivered on 18 July 1995, in which, after considering the conflicting High Court decisions in the *Wing Tiek Holdings* and the *PB Securities* cases, and giving my own reasons, I decided that O. 32 r. 13(2)(b), does not apply to affidavits in reply in O. 14 proceedings. It follows, therefore, that, in my judgment, the defendants' affidavits are not disqualified and should be considered.

In their first affidavit, the defendants deny owing the plaintiff RM672,408.32. They question the correctness of the invoiced amounts without, however, stating in what respect they are not correct. They say that the goods sold by the plaintiff were damaged and not merchantable and that therefore the price should be reduced, but they have not given particulars of the alleged damage or defect. Therefore the allegations of incorrect amount and damage and defect are mere bare allegations. They also say that the plaintiff owes them a sum of RM727,774.67 as at 17 October 1995, besides interest on it, and that the sum allegedly owed by them should be deducted from the sum allegedly owed by the plaintiff.

The defendants claim that the counterclaim sum of RM727,774.67 was the price of goods bought by the plaintiff from the defendants. To support that claim, the defendants exhibit a purported invoice dated 17 October 1995 which is unnumbered and does not bear any acknowledgment of the plaintiff. Neither are the spaces for terms of payment, account number, the plaintiff's reference and the defendants' delivery orders filled in. The invoice gives particulars of the quantities, unit prices, and full prices of five different textiles. The total price for the five items is RM631,018.50. There follows a statement of interest charged amounting to RM96,756.17 for the period from 6 November 1993 until 17 October 1995, which means that the goods in the invoice, if indeed delivered, were delivered during that period. It also means that there had been no separate invoice for each of the alleged deliveries and that all the deliveries were lumped together into one invoice dated 17 October 1995, which, however, does not show the dates on which the goods were actually supplied.

The plaintiff, in his second affidavit, in respect of the defendants claim of the sum of RM727,774.67, maintains (para. 6) that he never bought any goods from the defendants and that the defendants' invoice contains false particulars. He says (para. 5) that the first time he ever saw the invoice was when it came with a letter of demand from the defendants' solicitors dated 15 October 1995. He denies (para. 9) that his goods were damaged or not merchantable and says (para. 8) that the defendants had not previously raised the question and (para.

6) had never returned any goods. He denies (para. 7) that his invoiced amounts are not correct.

In their second affidavit the defendants deny paras. 6, 7 and 8 of the plaintiff's second affidavit and say that they will prove what they allege.

As regards their claim against the plaintiff, the defendants exhibit to their second affidavit lists giving a breakdown of the total quantity of each of the five textiles in the invoice exhibited to their first affidavit but without explaining the trade function of the lists. The breakdown is according to date, colour of fabric and the quantity for the particular colour. The lists are on the defendants' letterheads but are undated and do not bear a description of the purpose of the lists or any reference to the plaintiff. The dates range from 29 October 1993 to 6 November 1993. It would appear as if goods supposedly supplied within a week at the end of 1993 were only invoiced for in a purported invoice which was dated 17 October 1995 and – what is also strange – was annexed to a letter of demand dated two days earlier, 15 October, which was the defendants' response to the letter of demand of the plaintiff's solicitors dated 6 October 1995. As to the plaintiff's claim that that was the first time that he ever saw the invoice, the defendants in para. 5 of their second affidavit merely say that the invoice had been given to the plaintiff. If that is meant to refer to an earlier occasion, the defendants do not say when that was or support what they say by any proof.

As against the plaintiff's claim of RM672,408.32, the only points of defence raised by the defendants are incorrect amount and goods damaged and not merchantable. Those are bare allegations not supported by any particulars to satisfy me that they are issues that merit looking into in a full trial. The plaintiff is therefore entitled to summary judgment on his claim.

What is now left to decide is whether I ought to exercise my discretion under para. (2) of O. 14 r. 3, to stay execution of judgment until after the trial of the counterclaim of the defendants. At this stage, the evidence that the defendants have offered to support the claim as to the existence of a counterclaim are only the documents that I have described.

In the absence of any explanation of the unsatisfactory aspects or circumstances pertaining to those documents that I have highlighted, I must view those documents with suspicion. In view of that, and considering the denial of the plaintiff of the existence of any basis for the counterclaim, I decline to order a stay of execution.

I dismiss the appeal with costs.